

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
VONAGE HOLDINGS)	
CORPORATION)	
)	WC Docket No. 03-211
Petition for Declaratory Ruling)	
Concerning an Order of the Minnesota)	
Public Utilities Commission)	

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

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I. INTRODUCTION

The National Association of State Utility Consumer Advocates (“NASUCA”)¹ hereby replies to the comments filed in this proceeding by other parties.² The vast majority of the

¹ NASUCA is an association of 44 advocate offices in 42 states and the District of Columbia. NASUCA’s members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and Federal regulators and in the courts.

² Comments were filed by 8X8, Inc. (“8X8”); Alliance for Public Technology (“APT”); Association of Public-Safety Communications Officials-International (“APCO”); Beacon Telecommunications Advisors, LLC (“Beacon”); BellSouth Corporation (“BellSouth”); CenturyTel, Inc. (“CenturyTel”); Cinergy Communications Company (“Cinergy”); Cisco Systems, Inc. (“Cisco”); Dr. Robert A. Collinge (“Collinge”); Communications Workers of America (“CWA”); DJE Teleconsulting, LLC (“DJE”); Frontier and Citizens Telephone Companies (“Frontier”); High Tech Broadband Coalition (“HTBC”); ICORE, Inc. (“ICORE”); Independent Telephone & Telecommunications Alliance (“ITTA”); Iowa Utilities Board (“IUB”); Level 3 Communications, LLC (“Level 3”); Metropolitan 911 Board; Minnesota Department of Commerce (“MDOC”); Minnesota Independent Coalition (“MIC”); Minnesota Office of the Attorney General (“MinnAG”); Minnesota Public Utilities Commission (“MPUC”); Minnesota Statewide 911 Program; Montana Independent Telecommunications Systems (“MITS”); Montana Telecommunications Association (“MTA”); Motorola, Inc. (“Motorola”); National Exchange Carrier Association, Inc. (“NECA”); National Telecommunications Cooperative Association (“NTCA”); New York State Department of Public Service (“NYDPS”); Organization for the Protection and Advancement of Small Telephone Companies (“OPASTCO”); PAETEC Communications, Inc. (“PAETEC”); People of the State of California and the California Public Utilities Commission (“California”); Public Utilities Commission of Ohio (“PUCO”); Qwest Communications International Inc. (“Qwest”); Rural Iowa Independent Telephone Association (“RIITA”); SBC Communications Inc. (“SBC”); Sprint Corporation (“Sprint”); SureWest Communications (“SureWest”); TCA, Inc. - Telecom Consulting Associates (“TCA”); Texas Coalition of Cities for Utility Issues (“TCCFUI”); Texas

comments filed argue -- for various reasons -- that the Federal Communications Commission (“Commission”) should deny the petition filed by Vonage Holdings Corporation (“Vonage”). The Vonage petition asks the Commission to preempt a state commission decision declaring Vonage’s Voice over Internet Protocol (“VoIP”) service to be a telecommunications service subject to state regulation.³ The majority of the comments -- including some that otherwise support Vonage⁴ -- also recommend that the Commission open a comprehensive proceeding to review the regulation of VoIP service.⁵ As shown by NASUCA’s own initial comments, NASUCA agrees with the majority on both of these points.

Those opposed to Vonage’s petition include consumer advocates,⁶ state regulatory

Commission on State Emergency Communications and Texas Emergency Communications Districts (“Texas 9-1-1 Agencies”); Time Warner Telecom, Inc. (“Time Warner”); United States Department of Justice and Federal Bureau of Investigation (“DoJ/FBI”); United States Telecom Association (“USTA”); USA DataNet Corporation (“USA DataNet”); Verizon; Voice on the Net Coalition (“VON Coalition”); Warriner, Gesinger & Associates, LLC (“WGA”); Washington Enhanced 911 Program; WorldCom, Inc. d/b/a MCI and the Competitive Telecommunications Association (“MCI/CompTel”)

³ Specifically, Vonage requests the Commission to preempt the Minnesota Public Utilities Commission (“MPUC”) order which declared Vonage’s VoIP service to be a telecommunications service subject to state laws and the MPUC’s rules. *In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota*, MPSC Docket No. P-6214/C-03-108, Order Finding Jurisdiction and Requiring Compliance (September 11, 2003). On October 16, 2003, the United States District Court of the District of Minnesota issued a permanent injunction that stayed the MPUC order. *Vonage Holdings Corporation v. Minnesota Pub. Util. Comm.*, Civil File No. 03-5287 (MJD/JDL), Memorandum and Order (October 16, 2003). This stay places Vonage in the same position it had before the MPUC decision; thus Vonage’s business is not dependent on the Commission’s immediate resolution of its petition.

⁴ See, e.g., Level 3 at 3; Time Warner at 5-6; Verizon at 3.

⁵ In a news release dated November 6, 2003, Chairman Powell announced that the Commission would open the broad VoIP proceeding “shortly after” December 1, 2003.

⁶ NASUCA and MinnAG.

commissions,⁷ governmental agencies,⁸ emergency service providers,⁹ large incumbent local exchange carriers (“ILECs”),¹⁰ mid-size ILECs,¹¹ small ILECs and their representatives,¹² organizations of all-size ILECs,¹³ providers of service to ILECs,¹⁴ a labor union,¹⁵ supporters of advanced technology,¹⁶ and an enlightened VoIP provider.¹⁷

By contrast, the few comments supporting Vonage come from providers of VoIP service,¹⁸ manufacturers of telecommunications equipment,¹⁹ and an economist who ignores the

⁷ California; IUB; MPUC; NYDPS; PUCO.

⁸ DoJ/FBI; MDOC; TCCFUI.

⁹ APCO; Metropolitan 911 Board; Minnesota Statewide 911 Program; Texas 9-1-1 Agencies; Washington Enhanced 911 Program.

¹⁰ BellSouth; Qwest; SBC; Sprint; Verizon. Verizon correctly argues that Vonage’s service is a telecommunications service and not an information service (Verizon at 4-12) but then goes to far by saying that the service is only an interstate service. *Id.* at 12-13.

¹¹ CenturyTel; Frontier; SureWest.

¹² ITTA; MIC; MITS; MTA; NTCA; OPASTCO; RIITA.

¹³ USTA.

¹⁴ Beacon; DJE; ICORE; NECA; TCA; WGA.

¹⁵ CWA.

¹⁶ APT.

¹⁷ Cinergy.

¹⁸ 8X8; Level 3; MCI/CompTel; PAETEC; Time Warner; USA DataNet; VON Coalition.

¹⁹ Cisco; HTBC; Motorola. HTBC states that “the best way to achieve universal adoption of broadband is through strong facilities-based competition.” HTBC at 1. On that basis alone its support for Vonage is questionable, because Vonage is hardly a facilities-based competitor. See also VON at 3-4.

public interest.²⁰ The comments that support Vonage show just how flimsy are the arguments in favor of preemption.²¹

II. CONSUMERS USE VoIP AS A TELECOMMUNICATIONS SERVICE

The key issue for Vonage's petition is raised by the various claims that Vonage and other VoIP providers supply an information service, rather than telecommunications services. These legal arguments are discussed in the next section. For now, however, it is important to recognize that despite these legal arguments, Vonage and the other VoIP providers actively market their alleged information services as substitutes for ordinary telecommunications services.²² As SureWest notes, despite Vonage's assertions that what walks like a duck, quacks like a duck and has feathers like a duck is nonetheless not a duck, **Vonage advertises its service as a duck.**²³ HTBC's claim that Vonage's service "is little different than applications such as web browsing, e-mail or instant messaging..."²⁴ is contrary to the way those services are advertised for sale.²⁵

²⁰ Collinge.

²¹ See DoJ/FBI at 15-18 for a detailed discussion of why preemption is not necessary or appropriate.

²² The level of proper regulation for 8X8's video service (8X8 at 2) does not impact the level of regulation for the voice services under consideration here.

²³ SureWest at 4; see also MPUC at 4, NTCA at 4; Verizon at 7. The fact of advertisement destroys Dr. Collinge's abuse of the analogy, where he posits that customers might prefer a rubber duck to the real thing. Collinge at 1. Customers buy Vonage's service because it is advertised like a real duck – allowing voice communications – which a rubber duck cannot do.

²⁴ HTBC at 7.

²⁵ As noted in NASUCA's initial comments (at 6), "There is no transformation of keystrokes into words on a screen, as with e-mail; there is no visual element, as with searching the web; and there is no storage in digital form, as with MP3 files."

8X8, one of Vonage's strongest supporters, asserts that the service that it and Vonage offer is an information service. Yet here is 8X8's website description of its Packet8 service:²⁶

What is Packet8?

Packet8 is a communication service like no other.

By taking advantage of high-speed internet connections that are becoming so common, 8x8 is able to offer a complete communications service that is [affordable](#) and [easy to use](#). Unlike most new technologies, Packet8 has been designed with the user in mind. From the online ordering to the installation — Packet8 is simple.

How does it work?

Packet8 uses your existing high-speed internet connection (dsl/cable/other broadband) to allow you to make and receive phone calls. When you join Packet8 you will be sent a small device called a terminal adapter that plugs into your home network. You will then plug a telephone (the phone, not a phone line) into this terminal adapter. You are now ready to make calls with Packet8.

These phone calls will be carried over your internet connection until the last point where they are handed off to the traditional phone service to complete the call. This allows you to save a tremendous amount of money on local, long distance, and international calls.

When you sign up, you are also given a Packet8 phone number that can be used for others to call you on your Packet8 phone. This Packet8 phone number stays the same no matter where you use your Packet8 account. If your Packet8 number is a California number and you move your terminal adapter to a location in New York, people can still call your California number and reach you. Try doing that with your regular phone company!

What do I need?

There are 3 things you need to start enjoying the benefits of Packet8.

1. A high-speed internet connection such as DSL or Cable.
2. A home router to share your broadband connection (such as Netgear™, Linksys™, or D-Link™)
3. A Packet8 terminal adapter

A home router is a device that allows you to share your internet connection with multiple computers or devices. Many of these home routers cost as little as \$30.00 to \$50.00 and allow you to have a home network in minutes. They have the ability (DHCP) to assign IP addresses to the devices on your network and manage incoming and outgoing traffic on your network. In other words, they do all the work for you!

The Packet8 terminal adapter is a device that turns your regular telephone into an Internet telephone. This is shipped to you once you sign up for service. If you are using this device with a home router, then all you need to do to get started is to plug it in to the network and turn it on.

That's it!

And here is USA DataNet's description of its "innovative, value-added services"²⁷:

²⁶ See <http://www.packet8.net/about/index.asp> (accessed 11/3/2003).

Talk as long as you like and **never pay more than \$1.49 per call** to anywhere in the U.S.

- \$1.49 maximum charge per call to anywhere in the U.S.
- Calls under 15 minutes are just 10 cents per minute
- No fees
- Same rates 24 hours a day, 7 days a week
- No switching phone companies
- Calls to Canada are just 10 cents a minute but never more than \$1.99 per call
- Rates listed above are valid from your home phone
- You can make calls while away from your home for the travel rate of 14.9 cents per minute. Just dial the toll-free access number from any location. You will be asked to enter your authorization code (assigned upon registration) and the phone number you are calling. These calls will appear on your regular USA Datanet invoice. Calls placed from pay phones are subject to a 29-cent FCC-mandated pay phone charge.

USA DataNet's "Customer Testimonial" page shows no evidence of innovative service -- other than its lower cost.²⁸

As California states, "With the exception of voice mail, which is considered an information (or enhanced) service, all of the services which Vonage offers parallel the regulated basic local exchange service that an incumbent local exchange carrier offers."²⁹ California describes in detail how Vonage's service is a "telecommunications service."³⁰

In the petition, Vonage says that it provides an information service because it "processes"

²⁷ See USA DataNet at 1; <http://www.usadatanet.com/products.html?mode=phone&details=149&state=Ohio> (accessed November 9, 2003).

²⁸ <http://www.usadatanet.com/ctest.html> (accessed November 9, 2003).

²⁹ California at 3; see also Verizon at 4; Washington Enhanced 911 Program at 3-4.

³⁰ *Id.* at 4.

and “transforms” the “information transmitted by its users.”³¹ Yet the very purpose of VoIP is to reproduce what the caller says on his end as precisely as possible on a real-time basis -- words, tone, accent, and emotion -- to the called party, *just like traditional voice telephone service*. The calls carried by VoIP providers like Vonage are virtually indistinguishable from calls carried by companies like SBC, Sprint or Verizon over the public switched telecommunications network.³² As CenturyTel notes, “Nowhere in Vonage’s description of its ‘Broadband Phone’ service is there any mention of information generation, storage, retrieval or other manipulation that would signify an information service.”³³

Frontier notes that “Vonage requires its customers to provide the equivalent of a local loop by requiring a third-party broadband Internet connection. A carrier that requires its customer to provide a local loop is no less a carrier than one that provides end-to-end service.”³⁴

HTBC attempts to support Vonage by citing the portability of Vonage’s telephone numbers.³⁵ Yet its comparison to commercial mobile radio services (“CMRS”), also with portable numbers, only emphasizes that Vonage provides a voice telecommunications service. Indeed, as MIC points out, Vonage’s use of telephone numbers is part of what makes it a

³¹ Petition at 12; see Section III, *infra*.

³² 8X8 asserts that VoIP service surpasses the sound quality of PSTN calling. 8X8 at 4. If so, that merely shows that VoIP is a better telecommunications service, not an information service.

³³ CenturyTel at 8.

³⁴ Frontier at 4.

³⁵ HTBC at 9.

telecommunications service.³⁶

8X8 asserts numerous other benefits of VoIP service.³⁷ None of these benefits come close to disqualifying VoIP as a telecommunications service. Level 3 says that VoIP “can incorporate features that permit customer interaction with stored data” and other information services.³⁸ But neither Vonage, nor 8X8, nor Level 3 claims to be actually offering such a service. Indeed, VoIP with features should still be a common carrier voice service, just as wireline basic service is a telecommunications service even though offered with voice mail.

California says that

in fundamental respects, Vonage’s VoIP service is substantially the same as the VoIP service that AT&T offers and concedes is “basic telephony” under Title II. ... The only distinction between Vonage’s VoIP service and that of AT&T is that the translation or conversion between digital formats takes place on the customer’s side of the network with Vonage, and within the network with AT&T. That distinction is not material for regulatory classification purposes.³⁹

As shown by the VoIP providers’ own advertisements, the protocol processing used for their calls is a distinction without a difference. SureWest shows how the Commission has relied on a functional analysis of services to make regulatory distinctions.⁴⁰

VON says that the Internet “offers openness, thereby encouraging innovation,” compared to the PSTN which “operates as a closed system on which it is impossible for innovative

³⁶ MIC at 10.

³⁷ 8X8 at 3-5.

³⁸ Level 3 at 7; see also Motorola at 11.

³⁹ California at 11-12.

⁴⁰ SureWest at 5; see also IUB at 1-2.

developers to build new applications.”⁴¹ Those who have lived through the vast changes in the public switched telephone network over the last three decades have seen many new applications introduced. VON’s hyperbole does not support Vonage’s petition.

The Commission should classify the service based on what the consumer uses the service for; in this case, voice communications. It should not matter if the voice communication is provisioned using cable, wireless, circuit switch or other types of infrastructure.⁴²

III. THE ARGUMENTS THAT VoIP IS AN INFORMATION SERVICE ARE BASELESS

Supporters of Vonage point to the net protocol conversion occurring in Vonage service.⁴³ But the protocol conversion undertaken through Vonage’s service is only required for computer-to-telephone or vice versa calls; no net conversion occurs with computer-to-computer calls. Thus computer-to-computer calling is not an information service.

As Time Warner points out, the Commission has acknowledged that “the issue of protocol processing is a difficult one.”⁴⁴ The processing that takes place should not allow Vonage to avoid regulation of what is marketed as a voice service.⁴⁵ Time Warner also acknowledges that

⁴¹ VON at 2.

⁴² See WGA at 2.

⁴³ Cisco at 3; HTBC at 3, 5.

⁴⁴ Time Warner at 6, citing *Report to Congress*, ¶ 51. As California points out, the Commission previously found that protocol conversion did not automatically convert a service -- AT&T’s frame relay service -- into an enhanced service. California at 13-14; see also TCA at 3.

⁴⁵ The classification of services line 8X8’s IP video service (see 8X8 at 2-3) is not relevant to the disposition of Vonage’s petition on voice service.

the Commission's current "regulations are clearly inadequate for dealing with a service that contains end-to-end protocol conversions and yet is offered as a substitute for basic voice service...."⁴⁶

Those regulations are also inadequate for dealing with a voice service that requires consumer premises equipment different from a POTS telephone.⁴⁷ Especially because, as noted, there is little functional difference in the services.⁴⁸

As for phone-to-phone and computer-to-phone calling, supporters of Vonage refer to the Commission's "official" criteria defining Internet-carried calls as "telecommunications services."⁴⁹ These references vastly exaggerate the weight the Commission gave to those criteria.⁵⁰ VON acknowledges, in fact, that the "Commission expressly deferred any definitive pronouncements regarding VoIP, including phone-to-phone VoIP."⁵¹ Yet VON then says that "[t]he Commission's silence since then should be construed by the states as federal intent that VoIP remain unregulated."⁵² VON cites no authority for this *sub silentio* deregulation.

⁴⁶ Time Warner at 5.

⁴⁷ See 8X8 at 8-10.

⁴⁸ Id. at 10.

⁴⁹ HTBC at 2; see also Cisco at 3-4.

⁵⁰ See HTBC at 6 (In the Universal service report, "the Commission said that a VoIP service should only be considered a 'telecommunications service' if it satisfies a four-prong test...."); see also 8X8 at 6-7.

⁵¹ VON at 6; see also NYDPS at 3. NASUCA provided a lengthy quote from the *Report to Congress* in initial comments.

⁵² VON at 13.

SureWest points out that there is a net protocol conversion in wireless-to-wireline calling, and also in calls from customers with fiber loops to customers on the copper network.⁵³ SureWest concludes that “either [Vonage’s] analysis is flawed, or the validity of the net protocol conversion test has been superceded by advances in digital technology.”⁵⁴ And to further show the flaws in Vonage’s analysis, ITTA asserts that, in fact, there is no net conversion in Vonage’s service.⁵⁵

Vonage’s supporters cite to the District Court decision.⁵⁶ It should not be forgotten that seldom if ever does a United States District Court issue the definitive word on the meaning of federal statutes. MCI/CompTel inadvertently show the weakness of their position by quoting only the conclusions of the District Court,⁵⁷ as if those conclusions were the final word. Citation to the District Court decision fails to provide any real support for the claim that Vonage’s service is an information service under the law.

MCI/CompTel assert that “[a]s the district court in Minnesota understood, VoIP service is simply an application that rides over bottleneck broadband networks.”⁵⁸ That may be... but the application that Vonage provides is a voice telecommunications application. As noted above,

⁵³ SureWest at 7.

⁵⁴ *Id.* (footnote omitted).

⁵⁵ ITTA at 4-7; see also *id.* at 8.

⁵⁶ Cisco at 58X8 at 7-8; HTBC at 4-5; Level 3 at 3-4; PAETEC at 2-3; USA DataNet at 2.

⁵⁷ MCI/CompTel at 5-9.

⁵⁸ MCI/CompTel at 11.

function -- rather than any finding of the district court -- should govern this Commission's determination.

TCCFUI correctly notes:

"Information" is not the commodity being provided or sold by VoIP, it is a telecommunications service through a different technology. VoIP providers acknowledge this fact by marketing their services as a replacement of the incumbent telephone company. VoIP cannot be carved out as an "information service" from its "uses of telecommunications services."⁵⁹

Vonage's service is a telecommunications service. This is confirmed by Cinergy, itself a VoIP provider, which states that it "believes that Voice over Broadband ('VoBB') services such as Superlink VBX™ [Cinergy's VoBB service] and Vonage's voice service are telecommunications services and not information services."⁶⁰ As Sprint states, "Vonage has chosen to use the Internet as a means of transporting calls, nothing more, nothing less."

As MTA state:

Vonage ... alleges that classification of its DigitalVoice service as a telecommunications service may result in state or federal obligations with which it would be impossible for Vonage to comply. The implication is that such a classification may harm Vonage by preventing it from doing business in Minnesota.

A more realistic assumption may be that such a classification might force Vonage to meet the same obligations that any other telecommunications service provider satisfies while doing business in Minnesota.⁶¹

NASUCA agrees.

⁵⁹ TCCFUI at 2 (footnote omitted).

⁶⁰ Cinergy at 1.

⁶¹ MTA at 7.

IV. VoIP'S IMPACT ON CONSUMERS' HEALTH AND SAFETY

Dr. Collinge asserts that “the individual interests of the states ... seem likely to conflict with the collective interests of society, which is generally enhanced by choice, competition, and technological progress.”⁶² The E9-1-1 issue is one that shows how the “collective interests of society” can necessitate state action.⁶³

For its part, 8X8 attacks state regulation of VoIP because it “creates intolerable market uncertainty.”⁶⁴ Again, some degree of market uncertainty is an acceptable trade-off for the public safety concerns expressed in state E9-1-1 regulations.⁶⁵ And 8X8 also asserts that state E9-1-1 regulation is wrong because it does not “take advantage of the significant enhanced capabilities of the IP network.”⁶⁶ At present, apparently neither Vonage nor 8X8 has figured out a way to satisfy state E9-1-1 concerns with those enhanced capabilities -- although they claim to be

⁶² Collinge at 2 (emphasis deleted).

⁶³ See APCO at 2.

⁶⁴ 8X8 at 12; see also Motorola at 1, 7-8. Motorola asserts that it has a unique perspective on VoIP. *Id.* at 3-4. Actually, Motorola's position as a firm that benefits financially from increased use of VoIP service is the same as the other Vonage supporters.

⁶⁵ Motorola attacks state regulation as “wreaking havoc on the business plans of VoIP providers.” *Id.* at 7. It is hard to have sympathy for business plans that assumed that the business would remain unregulated. And Motorola's point that “multi-state rollouts require central planning efficiencies” (*id.*) gives no reason why VoIP should be excused from the state-by-state regulation that ILECs and CLECs are subject to.

⁶⁶ *Id.* at 17.

working on it⁶⁷ -- which does not seem to be an adequate reason to preempt the states.⁶⁸ MDOC discusses in detail how, in fact, state 9-1-1 regulations do not conflict with federal law.⁶⁹

Cisco is seemingly even more forward-looking: “VoIP -- in all its forms -- can and should help resolve important public policy concerns, particularly those related to public safety, law enforcement, and national security.”⁷⁰ Unfortunately, it seems that some VoIP providers -- like Vonage -- appear determined to avoid such responsibilities.⁷¹ Frontier correctly notes that “[i]f the only way that Vonage can supply safe service is to be regulated as a CLEC, then Vonage must be regulated as a CLEC.”⁷²

⁶⁷ *Id.* MDOC details (at 5-8, 21-22) the grisly history of Vonage’s 9-1-1 efforts in Minnesota.

⁶⁸ The Minnesota Statewide 911 Program (at 2) sets forth a number of appropriate public safety conditions that could be placed on VoIP service. See also Washington Enhanced 911 Program at 4-5.

⁶⁹ MDOC at 17-21; see also CWA at 11-14. NASUCA agrees with Texas 9-1-1 agencies that it would be helpful if, as an early and expedited portion of its upcoming VoIP proceeding, the Commission specifically addressed 9-1-1 issues.

⁷⁰ Cisco at 6.

⁷¹ Cisco says (*id.*) that “[t]he Commission should begin considering refinements to the existing federal regulatory framework to accommodate these issues.” Perhaps the VoIP providers should consider refinements to their service to accommodate these public policy concerns.

⁷² Frontier at 7.

V. VONAGE'S JURISDICTIONAL TRAFFIC ISSUES

HTBC notes that the Commission has found that Internet traffic is interstate in nature because it is impossible to determine where Internet transmissions terminate.⁷³ Yet it is indeed possible to determine where Vonage calls terminate. Vonage calls placed to, for example, its customers' Minnesota telephone numbers can be deemed to terminate in Minnesota, at least to the same extent that such determination can be made for traditional calls over the PSTN. ICORE points out that Vonage itself *prices* its service differently for "local regional" minutes, long distance minutes, and international minutes.⁷⁴ As ICORE states, "It is somewhat disingenuous, then, for Vonage to claim that its services cannot be separated jurisdictionally between intrastate and interstate, when its website provides a wealth of information to the contrary."⁷⁵

VI. THE IMPACT OF VoIP ON ACCESS CHARGES

MCI/CompTel suggest that the best way to solve the problem of Vonage's arbitragic avoidance of access charges is to reform the entire access charge system.⁷⁶ It is understandable why MCI -- a carrier, just emerging from bankruptcy, that predominantly uses other carriers'

⁷³ HTBC at 8.

⁷⁴ ICORE at 10.

⁷⁵ *Id.*; see also California at 19-20. WGA points out (at 7) that a percentage of interstate use ("PIU") factor could be developed for Internet voice service.

⁷⁶ MCI/CompTel at 13; see also BellSouth at 5-6.

local networks -- would willy-nilly support anything that might reduce its costs for using those networks.⁷⁷ This avoidance of the cost of paying access charges is a main source of Vonage's lower price, the service's key selling point.⁷⁸

On the other hand, Time Warner details the "costly and unnecessary disputes" the current *lack* of policy produces.⁷⁹ These disputes involve other carriers using Time Warner's network to provide service.⁸⁰

VON points to one of the benefits of VoIP, that "hundreds of thousands of low-income immigrants have used VoIP to dramatically lower the cost of communicating with friends and relatives outside the United States...."⁸¹ This is the same evasion of access charges on the international level that is taking place on the domestic side.⁸² It does not result from any of the "advanced" features available with VoIP.

VII. VoIP IMPACT ON HIGH COST FUNDS

NECA's comment crystallizes this issue: "[t]he requested exemption could undermine universal service ... if the Commission concludes that VoIP providers need not contribute to

⁷⁷ See MITS at 4.

⁷⁸ Despite this significant cost advantage not enjoyed by other providers, Vonage's rates are not markedly lower than ILEC and CLEC unlimited local/long distance calling packages

⁷⁹ Time Warner at 4.

⁸⁰ *Id.* at 5.

⁸¹ VON at 3.

⁸² See WGA at 5.

universal service programs.”⁸³ And OPASTCO takes the issue one step farther: Regardless of how Vonage’s service is ultimately classified, the service confirms the need to expand the base of universal service fund contributors to include facilities-based Internet service providers.⁸⁴

VIII. CALEA COMPLIANCE ISSUES

It is the view of the United States Department of Justice and the Federal Bureau of Investigation that granting an information service provider exemption to Vonage would violate the Communications Assistance for Law Enforcement Act of 1994 (“CALEA”).⁸⁵ That should be sufficient grounds for the Commission to deny Vonage’s petition and to more fully explore these issues in the upcoming rulemaking.

IX. CONCLUSION

Level 3 asserts that

[i]t would be both incorrect and overreaching to find ... all VoIP services ... to be a substitute for basic local exchange services, and that they therefore necessarily should be subject to the same regulatory framework as traditional telephone services.⁸⁶

It would also be incorrect and overreaching to find that **no** VoIP service is a substitute for basic local exchange service, or that **no** VoIP service should be regulated. Yet that is what Vonage,

⁸³ NECA at 4.

⁸⁴ OPASTCO at 9.

⁸⁵ Pub. L. No. 103-414, 108 Stat. 4279. See DoJ/FBI at 12-13.

⁸⁶ Level 3 at 5.

Level 3 and other VoIP providers would have the Commission do.

Further, to the extent that the Commission finds that the mere protocol conversion involved in changing voice into packet-switched data is enough to justify deregulating, ICORE points out that the end result will be “that telephone companies everywhere may morph into ‘information service providers.’”⁸⁷ As Frontier forthrightly states:

If the Commission were to grant Vonage’s petition, Frontier would have an enormous economic incentive to follow the same path. Frontier would offer its customers CPE that makes a voice-to-IP conversion and replace its circuit switches with IP-based packet switches as quickly as possible, because Frontier would then gain the economic benefits of deregulation.⁸⁸

California sums up the issues well:

Vonage ... maintains that classification of its services as common carriage is at odds with federal policy. Quite the opposite is true. By classifying Vonage’s real-time voice service as an information service, Vonage thwarts significant federal policies that are otherwise applicable to carriers offering functionally similar service.⁸⁹

As ITTA asserts, “Vonage has failed to demonstrate either that its VoIP service is an information service or that it is purely interstate, and has therefore failed to establish the legal predicate necessary for preemption of the MPUC’s interpretation of its own statute.”⁹⁰ Indeed, MDOC shows that the extent of the preemption requested by Vonage is unclear.⁹¹

⁸⁷ ICORE at 5.

⁸⁸ Frontier at 10.

⁸⁹ California at 17. CWA outlines (at 9-10) the key federal and state requirement that are imposed on providers of telecommunications.

⁹⁰ ITTA at 1.

⁹¹ MDOC at 24.

For the reasons set forth herein, NASUCA submits that the Commission should not enter a Declaratory Order as requested by Vonage's petition. Especially, the Commission should not overreach and adopt Motorola's request that the Commission "immediately preempt *all* state regulation of VoIP service that share the same or similar characteristics as the Vonage service...."⁹² The Commission should, instead, undertake a comprehensive examination of the many interrelated issues raised by VoIP, to ensure that consumers are protected and will receive the benefits of the new technology.⁹³ As the PUCO states, "the FCC should pursue a path of diligence and consistency by undertaking a more holistic examination of the complicated regulatory issues surrounding the recent proliferation of VoIP services."⁹⁴

Respectfully submitted,

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⁹² Motorola at 2 (emphasis in original). As Sprint notes (at 3), "there are no well-defined federal objectives at issue here which would warrant broad federal preemption." And as APT observes (at 1), preempting state regulation "would only create more uncertainty."

⁹³ See MCI/CompTel at 4, 14-15.

⁹⁴ PUCO at 2.

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